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97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-527

SHOPPING CENTER PROTECTIONS IMPROVEMENTS ACT OF 1982

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REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 2297

AUGUST 17, 1982.—Ordered to be printed

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CONTENTS

	Page
Purpose of the bill	1
Introduction and history of the bill	1
Background and need for legislation	7
Summary of bill and sectional analysis	18
Budget and regulatory impact	21
Changes in existing law	21

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SHOPPING CENTER PROTECTIONS IMPROVEMENTS ACT OF 1982

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Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2297]

The Committee on the Judiciary, which considered the bill (S. 2297) to make certain changes in Public Law 95-598, the Bankruptcy Reform Act of 1978, having considered the same, reports favorably thereon and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of S. 2297 is to make certain changes in Public Law 95-598, the Bankruptcy Reform Act of 1978 ("the 1978 Act"). The 1978 Act enacted the Bankruptcy Code (the "Code"), which contains the substantive law of bankruptcy, and a number of other provisions relating to bankruptcy administration. The changes made by S. 2297 are not intended to alter any of the basic purposes or policies of the 1978 Act. Instead, they are intended to clarify and improve certain protections for shopping centers and their solvent tenants which were enacted by Congress in the Code, but which have proven ineffective. S. 2297 will protect the common interests of all parties, tenants, and landlords, when a shopping center tenant bankruptcy occurs. As a result of the unintended consequences of the 1978 Act, one shopping center tenant's bankruptcy can threaten the profitability and the existence of a shopping center and all the other tenants of the shopping center. S. 2297 would eliminate those unintended consequences.

INTRODUCTION AND HISTORY OF THE BILL

This report explains pertinent aspects of the U.S. shopping center industry and how the 1978 Act and S. 2297 apply to this essential industry. Shopping centers are made up of many commercial enter-

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prises, a few large but most small. The success of these businesses is dependent upon the success of the center as a whole and upon the successful operation of the agreements entered into by the shopping center tenants and landlord to insure that all the parties cooperate for their mutual benefit.

In the 1978 Act, Congress enacted Section 365 of the Bankruptcy Code. The legislation history and the text of this provision make indisputably clear that Congress recognized and sought to deal with the potential harm to shopping centers and their solvent tenants which arises when one tenant becomes bankrupt and, therefore, is entitled (or his trustee is entitled) to assume or assign his lease. In effect, Congress recognized that shopping center tenants are inextricably tied together. When one suffers financial failure, neighboring tenants may be placed in jeopardy as well if the Bankruptcy Code does not provide an efficient arrangement to fill the vacancy.

Prior to the enactment of the Code, the interests of the nonbankrupt tenants and the landlord were protected by the contractual power of the lessor to terminate the lease in the case of a tenant bankruptcy. When Congress eliminated this power in the 1978 Act, it sought to establish other protections. Unfortunately, these protections have not carried out the Congressional intent. As a result, in the years since the enactment of the 1978 Act, it has become possible for the trustee in bankruptcy, or the bankrupt himself:

(1) To fail to decide whether he wishes to assume or reject the lease for an extended period of time, and to leave the premises unused or partially unused to the detriment of the surrounding businesses and the landlord;

(2) To fail to perform his obligations under the lease when due, including the payment of rent and other charges; and

(3) To fail to assign his lease, when he does assign it, to an assignee who will use the premises as the lease requires.

When any one or more of these three situations occur, the economic health of the entire shopping center is threatened. S. 2297 strengthens the protections in the 1978 Act against these three situations to make their occurrence less likely and deals with other more technical problems with the 1978 Act.

THE BANKRUPTCY REFORM ACT OF 1978

On July 12, 1978, the Committee on the Judiciary reported S. 2266, the Senate version of the Bankruptcy Reform Act of 1978. On September 7, 1978, the Senate took from the desk H.R. 8200, the House version of the 1978 Act, struck the text of the bill and inserted in its place the text of S. 2266 and passed the bill as amended. On September 20, 1978, H.R. 8200, with further amendments, was passed again by the House. On October 5, 1978, the Senate repassed H.R. 8200, with additional amendments. On October 6, 1978, the House accepted the final Senate changes and cleared the bill for signature by the President. On November 6, 1978, President Carter signed the bill and it became Public Law 95-598. On October 1, 1979, it went into effect.

Prior to the enactment of the Code, the bankruptcy law was contained in "the Bankruptcy Act."[1] Under the Bankruptcy Act, in the

[1] The Bankruptcy Statute of 1898, Ch. 541, 30 Stat. 544 (1898), as amended.

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case of the bankruptcy of a tenant, a shopping center was generally able to protect its interests and the interests of its other tenants by enforcing lease clauses permitting the lessor to regain control of the leased space. These lease clauses typically provided that if insolvency proceedings were initiated, the lessor could: (1) terminate the lease; (2) change the lease to a month-to-month tenancy; (3) waive or terminate an option to renew the lease; or (4) terminate the lease if the debtor was unable to maintain a certain sales volume or net worth.

Although some judicial decisions raised questions regarding the enforceability of such contractual agreements, these provisions usually enabled shopping centers to avoid damaging vacancies caused by the insolvency of a tenant.

SECTION 365 OF THE BANKRUPTCY CODE: LANGUAGE, STRUCTURE AND LEGISLATIVE HISTORY

Section 365 of the Bankruptcy Code relates to executory contracts and unexpired leases. Subsections (a), (b)(1), (b)(3), (d)(1), (d)(2), (e)(1), (f)(1) and (f)(2) are of primary importance regarding unexpired shopping center leases. These sections provide as follows:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.
>
> * * * * * * *
>
> (b)(3) For the purposes of paragraph (1) of this section, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—
>
> (A) of the source of rent and other consideration due under such lease;
>
> (B) that any percentage rent due under such lease will not decline substantially;
>
> (C) that assumption or assignment of such lease will not breach substantially any provision, such as a radius, location, use, or exclusivity provision, in any other lease, financing agreement, or master agreement relating to such shopping center; and
>
> (D) that assumption or assignment of such lease will not disrupt substantially any tenant mix or balance in such shopping center.
>
> * * * * * * *

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(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(d)(2) In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

* * * * * * *

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under pargaraph (2) of this subsection.

(f)(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

Subsection (e)(1) makes termination clauses unenforceable. Subsections (b)(1) and (f) permit the trustee to assume or assign an unexpired lease subject to other provisions of this section. Subsection (b)(1)(C) and (f)(2)(B) require adequate assurances of future performance in the case of the assumption or assignment, respectively, of an unexpired lease. Subsection (b)(3) makes explicit what specific assurances of future performance are required in the case of a shopping center lease.

By these provisions, a trustee's option to assume an unexpired shopping center lease after the lessee's default is limited not only by the general provisions of subsection (b)(1), but also by the specific "shopping center" provisions of subsection (b)(3). The purpose of these provisions is to ensure that an unexpired shoping center lease is assumed by the trustee only if the trustee provides adequate assurance of

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future adherence to the lease. The Code requires that performance to include assurances of the source of rent, assurances that percentage rents would not decline substantially (because of reduced sales), assurances that the use provisions contained in any other lease, financing agreement or master agreement would not be substantially breached, and assurances that the tenant mix would not be substantially disrupted.

Congress clearly intended to provide special protections for shopping centers and their solvent tenants when a trustee elects to assume an unexpired lease. Congress acknowledged the unique interrelationships of shopping center tenants and the potential ripple effect of a tenant bankruptcy on a shopping center and its solvent tenants by making shopping centers are the only kind of property protected with specific provisions of the 1978 Act, section 365(b)(3). An examination of the legislative history of these provisions explains and provides further support for the proposition that Congress intended to prevent shopping centers and their solvent tenants from being unnecessarily injured in the event that one tenant became insolvent.

As introduced, section 365(b)(1) and (f)(2) of H.R. 8200 required that "adequate assurances" of future performance be provided the lessor in the case of either an assumption or assignment by a trustee of an unexpired lease. The shopping center industry argued that this requirement was too vague to solve effectively the problems which would be encountered by shopping centers in the event of the assumption or assignment of a lease.

The House Judiciary Committee responded to these arguments by including the following language in its report:

> The unenforceability of ipso facto or bankruptcy clauses proposed under this section will require the courts to be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or lease, the courts will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain. An example of the complexity that may arise in these situations and the need for a determination of all aspects of a particular executory contract or unexpired lease is the shopping center lease under which the debtor is a tenant in a shopping center.
>
> A shopping center is often a carefully planned enterprise, and though it consists of numerous individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under these agreements, the tenant mix in a shopping center may be as important to the lessor as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center, and thus a higher rental for the landlord from those stores that are subject to a percentage of gross receipts rental agreement. Thus, in order to assure a landlord of his bargained for exchange, the court would have to consider such factors as the nature of the business to be conducted by the trustee or his assignee, whether that business complies with the require-

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ments of any master agreement, whether the kind of business proposed will generate gross sales in an amount such that the percentage rent specified in the lease is substantially the same as what would have been provided by the debtor, and whether the business proposed to be conducted would result in a breach of other clauses in master agreements relating, for example, to tenant mix and location.

H.R. Report No. 595, 95th Congress, 1st Session, 348–349 (1977).

The Senate Judiciary Committee also responded to these concerns by incorporating the following in S. 2266:

* * * * * * *

(b) (3) The provisions of paragraph (1) of this subsection shall not prevent termination of a lease pursuant to provisions contained therein—

(A) in a case under chapter 7 of this title;

(B) where the lease was entered into before the effective date of this title;

(C) where the property leased thereunder is not essential to the debtor's business;

(D) where the rent payable pursuant to the lease is substantially less than the fair rental value of the property leased thereunder; or

(E) where the lease contains provisions for rent contingent upon the lessee's profits or sales and the rent otherwise set forth in the lease was substantially less than the fair rental value of the property at the time the lease was entered into.

* * * * * * *

(b) (5) For purposes of this subsection, "adequate assurance" shall include with regard to an unexpired lease of the debtor reasonable assurance—

(A) of the source of rental payments and other consideration due and owing to the landlord under the lease agreement;

(B) that there will be no substantial decline in any percentage rates specified by the lease;

(C) that the assignment or assumption of the lease will not substantially breach clauses (including, but not limited to, radius, location, use, and exclusive clauses) in other leases, financing agreements, or a master agreement relating to the leased and adjoining leased premises; and

(D) that an assumption or assignment of a lease will not disrupt the tenant mix or balance in property subject to multiple individual leases and an overall master agreement.

Further, the Senate Committee made clear in its Report that subsection (b) (5) was intended to assist shopping centers:

Subsection (b) (5) provides that in lease situations common to shopping centers, protections must be provided for the lessor if the trustee assumes the lease, including protection against decline in percentage rents, breach of agreements with other tenants, and preservation of the tenant mix. Protection for tenant mix will not be required in the office building situation.

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S. Report No. 989, 95th Congress, 2d Session, 59 (1978).

By agreement of the Senate and House floor managers of this legislation, a compromise bill was introduced which contained the language in subsection (b)(3) and which was ultimately enacted.

In the Senate and House debates on the compromise bill, this provision was described as follows:

> Section 365(b)(3) represents a compromise between H.R. 8200 as passed by the House and the Senate amendment. The provision adopts standards contained in section 365(b)(5) of the Senate amendment to define adequate assurance of future performance of a lease of real property in a shopping center.

124 Cong. Rec. S 17409 (daily ed., Oct. 6, 1978) (remarks of Sen. DeConcini); 124 Cong. Rec. H 11093 (daily ed., Sept. 28, 1978) (remarks of Mr. Edwards).

THE SHOPPING CENTER PROTECTIONS IMPROVEMENTS ACT OF 1982, S. 2297

In March 1982, the Shopping Center Protections Improvements Act of 1982, S. 2297, was introduced by Senators Hatch and DeConcini and was subsequently co-sponsored by Senators East and Baucus of the Senate Subcommittee on Courts and by several other members of the Judiciary Committee. The bill was strongly supported by the shopping center industry. Individual shopping center landlords and tenants and the trade associations representing shopping center landlords, tenants and financiers testified in support of the bill.

Hearings were held in Washington, D.C. on May 3, 1982.

S. 2297 was unanimously voted out of the Subcommittee on Courts on May 21, 1982, with an amendment in the nature of a substitute offered by Chairman Dole accepted thereto.

On August 4, 1982, with a quorum present, the full Judiciary Committee by voice vote ordered the bill favorably reported having previously agreed to five amendments.

Background and Need for Legislation

The Bankruptcy Code, enacted by the Bankruptcy Reform Act of 1978, was the first major revision of the bankruptcy laws of the United States since 1938, and its enactment was the culmination of an effort that extended over a number of years. The Code made numerous substantive changes in the law of bankruptcy as well as in the administration of bankruptcy cases.

One of these changes made unenforceable lease clauses permitting a landlord to regain possession of premises leased to a bankrupt tenant. However, Congress recognized the unique interrelationship between shopping center tenants and the great potential for harm to shopping centers and their solvent tenants arising from the ability of a bankrupt tenant to assume or assign a shopping center lease. To protect this important sector of the economy from unnecessary economic harm, Congress enacted in section 365 of the Code certain protective provisions for shopping centers and their tenants. Unfortunately, these provisions have not accomplished these purposes. As a

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result, this Committee has reported S. 2297 to carry out Congress' intent as stated in the 1978 Act and to strengthen the protections for shopping centers under the Bankruptcy Code.

SHOPPING CENTERS ARE UNIQUE REAL ESTATE ARRANGEMENTS WHICH SUBSTANTIALLY BENEFIT THE ECONOMY

Shopping centers are an important sector of U.S. retail trade. In 1981, in the U.S. there were approximately 22,750 shopping centers with an estimated 1,255,000 retail stores. Approximately 42 percent of all U.S. retail trade amounting to $439 billion was conducted in shopping centers. In the coming year, 60 percent of all new retail space and 88 percent of new department store space is likely to be constructed in shopping centers.

The problems for shopping centers and their tenants caused by the present administration of the Code are serious and widespread. Conservatively estimated, 15,000 shopping centers have had one or more tenants involved in bankruptcies in 1981. Under this estimate, approximately 65 percent of all shopping centers were involved with the bankruptcies of 17,000 retail stores.

In a shopping center, the public benefits from the convenience and efficiency of "one-stop" shopping and frequently from the direct competition among the retail merchants who are tenants of the shopping center. The commercial success of the enterprise depends on the ability of all of the tenants to function as one entity. The shopping center is defined by its "tenant mix" which is carefully designed to serve a "trade area" and to draw sufficient customers from that trade area to support the rents paid by the tenants.

To make this enterprise work, each tenant must fully operate its store for a minimum of hours, engage in specified lines of business, advertise in ways that draw customers to the shopping center, and maintain certain standards of appearance and operation. This joint effort is cemented by a series of master agreements, entered into by all the parties involved in a shopping center, that set forth in precise terms the rights and obligations of each party.

As shopping centers have evolved, they have become larger and more sophisticated in design, construction and concept, involving tens of millions of dollars of investments by developers, tenants, and financial institutions. Once again, the linchpin of this entire operation is the freely accepted and openly negotiated contractual agreements among the parties.

While the operation of the bankruptcy law necessarily alters contractual relationships, these alterations have direct and potentially crippling impacts on other shopping center businesses, and consequently, must be strictly limited and minimized. Accordingly, the Committee has favorably reported S. 2297.

SHOPPING CENTER TENANTS AND THEIR LEASES ARE UNIQUE IN THEIR INTERDEPENDENCE

As Congress recognized in enacting the 1978 Act, shopping center leases are distinct from other leases of real property in that each lease arrangement memorializes not only the bilateral interests of the tenant

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and the landlord, but the multilateral relationships of every other tenant in the shopping center. The interdependence among the tenants of a shopping center means that the bankruptcy of one tenant will seriously affect the other tenants.

Shopping center leases frequently are made on a long-term basis in consideration of the large investment usually made by tenants in establishing their various enterprises. These long-term lease agreements put the landlord into a position unlike a merchandise creditor or a financial institutional lender. A shopping center landlord, unlike other creditors, cannot make periodic reviews of the financial condition of his customers and unilaterally terminate creditor loans whenever it appears that the customer's credit is impaired. These long-term contracts obligate both parties to honor their agreements to protect the delicate interrelationships which form the foundation for the shopping center's success.

Moreover, shopping center leases frequently contain "anchor" clauses which commit the tenant to a lease term only so long as another designated tenant remains in the shopping center. These provisions further manifest the symbiotic, interdependent nature of a shopping center.

Mr. Nathan B. Feinstein testifying before the Courts Subcommittee, capsulized this principle beautifully:

> Tenants locate in shopping centers based on the complementary ability of the various stores in the shopping center to draw customers. One looks to the advertising and the merchandising techniques of the larger stores (anchor stores) in choosing a shopping center. One considers carefully the cooperative advertising, the center promotions, and the parking and other common services. The shopping center and its tenant's association rely on a continuing stream of payments from tenant-shopkeepers to meet the snow removal, air conditioning, heating, parking lot maintenance, advertising, mortgage, tax and other obligations of the center. When the stream of payments is disrupted for a significant period of time, every shopowner suffers by the lack of maintenance and uncertain financial viability of the center. When an anchor store closes its doors and stops advertisements, the smaller stores suffer the lack of patronage. When Saks Fifth Avenue moves out as anchor store and John's Bargains moves in, the small independent fashion boutiques die. When the future of the center is in doubt, the businessman-tenant does not know how to order for the season.

These multifarious symbiotic relationships in the shopping center are in peril whenever any tenant suffers financial hardship or fails. The continued vitality of those relationships and the businesses in the center depends on the system our bankruptcy policies create to swiftly fill vacancies and fairly acknowledge the interests of remaining solvent tenants. Hearings on S. 2297 before the Subcommittee on Courts of the Senate Judiciary Committee, 97th Cong. 2d Sess. (1982) (hereinafter "Hearings").

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PROTECTION OF SOLVENT SHOPPING CENTER TENANTS IN THE EVENT OF THE BANKRUPTCY OF A TENANT

Prior to the enactment of the 1978 Act, the interests of the shopping center and its other tenants were protected against prolonged damage from a single tenant's bankruptcy by the contractual power of the lessor to control the disposition of the lease. As stated earlier, however, the 1978 Act made such lease clauses unenforceable. Nevertheless, Congress recognized the special bankruptcy problems in shopping centers by including in the Code special provisions governing unexpired shopping center leases. These provisions specify various assurances which the trustee must make in order to assume or assign an unexpired lease of the debtor.

Unfortunately, experience with these provisions indicates that they have not functioned as originally intended by Congress. Under the Bankruptcy Code, the shopping center and its solvent tenants may suffer serious economic harm or even business failure if a bankrupt tenant closes its store for an extended period of time or assigns its lease to a business which does not conform to the lease's use clause thus disrupting the shopping center's tenant mix. These problems are compounded when the bankrupt tenant is a major store in the shopping center.

S. 2297 seeks to make effective the protections that Congress intended to provide shopping centers and their tenants in the 1978 Act. S. 2297 accomplishes this by removing latent defects in certain provisions of the Bankruptcy Code. These perfecting amendments do not change the policy of the Code; they implement that policy. By making effective these protections, the bill strikes the proper balance between the interests of the solvent tenants of a shopping center and its insolvent tenants.

PROBLEMS AND SOLUTIONS

At the May 3, 1982, hearing on this bill testimony was received from the International Council of Shopping Centers—the trade association of the shopping center industry—from individual shopping center developers, and from the President of the Merchants Association of a shopping center which had experienced tenant bankruptcies. In addition, a statement was submitted for the record by the National Retail Merchants Association, which represents the small business tenants of shopping centers. Hearings, supra.

Shopping centers and shopping center tenants support this legislation because the administration of bankruptcies under the Code has resulted in numerous cases where shopping center tenant space was left closed for an extended period of time, where the trustee did not perform the debtor's obligations under the lease, or where shopping center space was assigned to a business not in conformance with the use clause.

The purpose of the bill is to remedy several substantive and technical problems relating to the operation and assignment of shopping center tenant space which have arisen under the Code. These problems and the bill's solutions to them are as follows.

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1. Time limit to assume or reject lease

a. *Problem.*—Under the 1978 Act, in a Chapter 7 (liquidation) case the trustee is required to decide within 60 days of the order for relief whether to assume or reject an executory contract or unexpired lease. However, no time limit is established for cases outside Chapter 7. Consequently, an extended period of time often passes before the trustee makes such a decision in a Chapter 11 (reorganization) case. During this dead time, the trustee often does not operate the space, or operates it at a much reduced level, thereby causing substantial economic harm to other tenants in the shopping center.

The testimony of witnesses representing shopping centers and shopping center tenants at the hearing and the statement for the record of the National Retail Merchants Association (NRMA) make clear that this is one of the major problems of shopping centers and their tenants caused by the administration of tenant bankruptcies under the Code.

The vacancy of any tenant space for an extended period of time can seriously disrupt an entire shopping center. Customer traffic is reduced not only by the decreased supply of products or services, but also by the less pleasant atmosphere caused by boarding up a portion of the shopping center. Where the vacant space is that of an anchor store, the effect on the shopping center and its other tenants can be devastating.

For example, Mr. John Holmes, President of a shopping center merchant's association in Frederick, Maryland, testified "to explain the damage to the other tenants of the Frederick Shopping Center resulting from the closing of these stores and the inability of the shopping center to release this space to operating businesses for a period of time." He then recounted that one store in the Frederick center was vacant for over nine months and another for nearly five months. He noted that: "I have difficulty understanding how other tenants . . . survived. Even the comparably short time [the bankrupt stores were closed] severely damaged the business of many of the merchants of this shopping center, and in many cases the stores have not yet recovered." Hearings, supra. He pointed out that some neighboring stores suffered 28 and 26 percent reductions in sales volume during the period the bankrupt's premises were vacant.

The shopping center landlord is injured in these circumstances because in many cases shopping center leases provide for rent as a percentage of revenues. These clauses are beneficial because they provide the landlord a financial incentive to preserve the most productive tenant mix. However, these clauses are often based on the calculation that tenant businesses will be in full operation. When a store is closed, or operated at a reduced capacity, the shopping center landlord's revenues also decline.

Detailed testimony was received from shopping center tenants regarding the serious problems to their businesses caused by the ability of the trustee to close a store in a shopping center for an extended period of time without stating his intention regarding the disposition of the premises, and preventing the landlord from re-leasing the space to an operating business. Mr. Wallace R. Woodbury of Salt Lake City,

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Utah, testified that a tenant in his shopping center had filed under Chapter 11 eight months previously, had still not submitted a reorganization plan, was not operating the premises and was not paying rent. One expert witness stated that it usually takes between nine months and a year to get a determination concerning the assumption or rejection of a lease in a contested Chapter 11 case.

During this time, the other tenants of a shopping center may be affected dramatically. The closing of even a single store in a shopping center may substantially reduce the revenues and increase the costs of the other tenants. Their revenues are reduced because the closing of a store in a shopping center, especially a major store, reduces the traffic flow through the shopping center.

The closing of a major tenant can also significantly increase the costs of the other tenants. In many shopping centers, common area charges are assessed each tenant on the basis of the tenant's percentage of total leased space. The closing of a major tenant substanitally reduces the amount of total leased space. This increases the percentage of total leased space of all the remaining tenants and their share of the common area charge.

Mr. Howard C. Oliver of Jim Wilson & Associates in Montgomery, Alabama, summarized the problem of delayed assumption as follows:

> [The law allows] open ended and often lengthy delays in the decision by the trustee or debtor-in-possession to assume or reject a shopping center lease. This often results in an extended period when a store is vacant, and this hurts the business of the other tenants and forces the shopping center and the other tenants to bear some of the costs of the bankruptcy. Hearings, supra.

b. *Solution.*—The bill reduces the severity of these problems by imposing a 60 day time limit on the trustee's decision to assume or reject the lease in all cases under the Code, unless the court, for cause, allows additional time. This puts the burden of justifying an extension on the party best equipped to gauge the length of time necessary to make an assumption decision.

In all but the most complicated reorganization cases 60 days should be a sufficient period to make this determination. Even in large reorganization cases, the debtor presumably knows his own business and understands the value of his assets well enough to make such decisions in 60 days. Also, the debtor is generally well aware in advance that a bankruptcy may be necessary and can plan ahead to decide which leases should be retained. The debtor should consequently be able to make this determination shortly after the petition is filed and certainly within 60 days in all but the most complicated cases. Nonetheless, the court has authority to grant extensions for cause.

2. Failure to perform lease obligations, including the payment of rent and other charges when due

a. *Problem.*—During the time the trustee is deciding whether to assume or reject the lease, the trustee frequently does not meet the lease obligations, such as paying rent and other charges. As discussed above, the trustee's failure to pay common area charges often increases the costs of the shopping center's other tenants.

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In addition, this situation often results in the landlord's providing current services—the use of his property, and the provision of utilities and security to protection and preserve the leased property—without current compensation, a burden imposed on no other class of creditor. This burden is particularly onerous where the landlord needs the rent payments provided in the lease in order to make tax or mortgage payments on the property.

In reference to this problem, Mr. Wallace Woodbury testified that:

> This presents a hardship to a landlord who may not receive a rent for several months and is unable to gain control of his premises. I am not aware of any other class of person who is required to provide a service to the bankrupt estate without current compensation. Hearings, supra.

b. *Solution.*—The bill solves this problem by requiring the timely performance of the lease obligations, including the payment of rent and other charges. However, the bill permits the court to extend the time for performance of such payments to a date no later than 60 days after the order for relief. Such an extension could be granted where a trustee is unfamiliar with the operation of the debtor's business and there is no reason to question his legal duty to pay rent or other charges or perform other obligations under the lease.

3. Compliance with use clauses and other provisions of the lease

a. *Problem.*—The Code currently requires adequate assurances that the assumption or assignment of an unexpired lease will not breach "substantially" important provisions of shopping center leases (provisions such as "radius, location, use of exclusivity" clauses) and will not "substantially" disrupt the tenant mix. Congress thus intended to protect shopping centers and their solvent tenants from the consequences of the violation of use clauses and the disruption of the tenant mix. Also, it is clear that whatever the intended meaning of the term "substantially," it has been interpreted in a way which has frrustrated the Congressional intent. While it may seem reasonable to permit the assignment of a women's wear store lease to a men's wear store, such an assignment can be commercially unreasonable because the clientele attracted by such stores would be vastly different. Such an assignment could be extremely damaging to the other men's wear store tenants as well as the other tenants in the shopping center. This was the damage Congress sought to prevent through the enactment of section 365 (b) (3) of the Code.

In practice, the qualification of the required assurances by the term "substantially" has led trustees or debtors-in-possession in some instances to ignore these lease clauses and, consequently, has permitted the disruption of the delicate interrelationships of the shopping center's tenant mix. In one case, the bankruptcy court permitted a tenant to change the use of its premises, a discotheque, to permit male striptease shows.[2] In another case, a bankrupt men's wear chain store assigned a number of leases to women's wear stores.[3] In another instance, advertisements for bids on shopping center space indicate that the term "substantially" permits gross deviations from the use clause.

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[2] *Reyco of Nevada v. Russel D. Johns*, 5 BCD 1074 (D. Nevada 1979).
[3] *In re Hughes & Hatcher, Inc.*, Case No. 82610152 (JC).

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These advertisements, placed by lease brokers, state that "all retail uses" would be considered even though the leases involved had more limited use clauses.

The assignment of a lease to a business that does not conform to the use clause of that lease, especially in the case of a major store lease, can affect the other tenants much in the same way as the closing of the store. Where the misassignment occurs in the case of the major store in a strip center, the effect can be disastrous, substantially reducing the revenues of all the other tenants. For example, the assignment of the lease of a grocery store, with substantial and steady drawing power, to a toy store, with less ability to attract customers, would reduce the traffic of all of the other shopping center tenants.

In a regional mall with more than one major tenant, the misassignment of that lease will have less effect on the entire mall, but stores adjacent to it may suffer considerable reductions in customers. For example, replacing a small store with substantial customer attraction power—such as a women's wear store—with another business which generates less traffic would have an adverse effect on the adjacent stores.

Adjacent stores also can be severely hurt through violations of the use clause when a complementary use is replaced with a competing use. Mr. Wallace Woodbury, for example, testified regarding space he had leased to a record and tape store situated next to a T.V. and consumer electronics store. Immediately after exercising a lease renewal option the tenant filed a bankruptcy petition and vacated the premises. Despite the fact that the landlord had a replacement tenant with substantial assets who complied with the use restriction of the lease, the Trustee assigned the lease to a financially unsound shell corporation which sold substantially the same type of merchandise as the adjacent T.V. store. On taking possession the assignee immediately advertised "going out of business prices." After suffering six months of unfair and ruinous competition from the assignee tenant the T.V. store vacated the premises on the grounds that the landlord's exclusive commitment to it had been violated. Seven months later and after failing to pay substantial rent, the assignee tenant itself went out of business and abandoned the premises. In the words of Mr. Woodbury, "the landlord ended up with vacancies in two stores, the substantial loss of rental income, and considerable building damage and the nonbankrupt tenant lost substantial sums and was forced to abandon the shopping center because of the trustee's utter disregard of the lease provisions which were designed to protect both the landlord and the non-bankrupt adjacent tenant." Hearings, supra.

Pre-existing stores also are disadvantaged if the rental payments of the assignee are lower than those of the pre-existing stores. Stores in the same line of business are usually charged equivalent rents based on their business use. Women's wear stores usually pay lower rents than other stores because they tend to draw more customers to the shopping center than do other types of stores. Thus, if the lease of a bankrupt women's wear tenant is assigned to a men's wear store, the assignee men's wear store may be paying less rent than will the pre-existing competing men's wear stores.

Also, the pre-existing men's wear stores may be harmed unfairly by the over-saturation of the men's wear market resulting from the

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assignment to an additional men's wear store. This deprives them of the benefit of their bargains with the developer which were based on an agreement on the number of men's wear stores to be included in the shopping center.

Senator Orrin G. Hatch, author of S. 2297, succinctly explained this situation in his statement to the Courts Subcommittee:

> In the event the lease is assumed by the administrator, it may be assigned to a business not in full compliance with the use limitations of the lease . . . For example, several men's shoe stores may have negotiated their leases with the shopping center understanding that all men's shoe stores would pay identical rent. Assigning a women's shoe store lease at a lower rent to another men's shoe store could both oversaturate the men's shoe store market and give the incoming store the unfair advantage of a lower overhead.

By disregarding a use clause in an assignment situation, the trustee is able to create and the sell an esset (the lease) that did not previously exist. This asset is not created out of thin air; rather, it is unfairly created at the expense of the landlord and the other tenants of the shopping center.

In many cases where the assignment of shopping center leases is a significant asset of the estate of the debtor, the debtor is a large chain store enterprise. Such enterprises negotiate with shopping center developers over lease provisions vigorously and from a position of strength. Use clauses and other lease provisions favorable to the landlord and other tenants are accepted as part of the lease by these tenants only because of the granting by the landlord of concessions in other terms of the lease. In the words of Nathan B. Feinstein, "[Use clauses] are almost always carefully drawn and extensively negotiated. More important, they are relied upon by other tenants in the shopping center." Hearings, *supra*. Careful adherence to the provisions in use clauses is necessary to give all enterprises in a shopping center the benefit of their respective bargains. More important, strict compliance with the use clauses is needed to ensure the other tenants that the center will be what they expected when they agreed to commit themselves and large amounts of capital to the center for a long period of time.

b. *Solution.*—By deleting the word "substantially," the bill makes clear that important lease provisions such as the use clause are to be honored and that the tenant mix is not to be disrupted. Not all shopping center leases contain restrictive use clauses, but where they are included in a lease they are necessary to define the tenant's business in relation to the other stores in the shopping center. Restrictions on the assignability of shopping center leases are justified by the need to protect the interests of the other tenants in the shopping center.

This provision does not unduly restrict the assignment of shopping center leases. Use clauses cannot be overly restrictive because they must permit enough flexibility to allow for the normal conduct of the original tenant's business. Mr. George Lambros of Missoula, Montana, who devoted his entire testimony to the use limitation problem, explained:

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> It is important to note that deleting the word "substantially" from these provisions would in no way prevent the assignment by debtors of their leases. Although shopping center lease use provisions are drawn with various degrees of specificity, even the narrowest use description still covers a market segment served by a very large number of existing and potential businessess. Although requiring strict performance of the use clause of the lease will limit the universe of potential assignees of any shopping center lease space, this limitation is absolutely necessary for the health of the shopping center and its other tenants and does not place an unreasonable burden on the debtor. Hearings supra.

Use clauses are not intended to prevent the assignment of leases and practice in the shopping center industry shows that they will be interpreted reasonably. Any attempt to preclude assignment by drafting a use clause which would apply only to the original tenant would be de facto prohibitions of assignment, and, therefore, would be unenforceable under section 365(f)(1).

Where the trustee is unable to find an assignee within the use clause who is willing to pay what the trustee considers an acceptable price for the lease, the Committee believes that it is appropriate for the lease to revert to the landlord.

Even where the landlord also is unable to find a replacement tenant with the same business use as the debtor, the Committee believes that it is preferable to have an alternate use determined by the landlord rather than by the trustee and the Bankruptcy Court. It is in the interest of the debtor to choose the assignee which will pay the highest amount for the lease and thus maximize the proceeds from the sale of the lease, regardless of the impact of the assignment on the other tenants. On the other hand, it is in the interest of the landlord to select an assignee who will have the most beneficial effect on the business of the entire shopping center even though that assignee may not pay the highest rent. This is the case because shopping center landlords derive much of their income from percentage rents, i.e., rents based on a percentage of the sales of the tenants. Thus, they have a strong incentive to select a tenant that will enhance the tenant mix and, thereby, increase the sales of all the tenants of the shopping center.

4. Operating and financial performance of assignee

a. *Problem.*—If shopping center space is assigned to a business in poor financial condition, the shopping center and its solvent tenants may soon find themselves dealing with another store in bankruptcy, with all of the attendant problems. As discussed above, when the trustee assigns space to a store in unsound financial condition, the harm to the landlord and the other tenants is compounded.

b. *Solution.*—Under the Code, adequate assurances of the source of rent and other consideration due under the lease must be given. The bill makes clear that this includes assurances that the assignee has an operating and financial performance similar to that of the debtor when the lease was first executed. This provision was amended by the full Judiciary Committee to ensure that it would not be interpreted to mean that the assignee must have exactly the same financial posture as

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the assignor. Instead, the assignee should have a similar operating and financial performance when all factors, including advertising aggressiveness, profit margins, growth potential, and other financial indicia, are weighed.

5. Payment of security deposit by assignee

a. *Problem.*—In some cases, the assignee of a lease is not required to pay the customary security deposit. Security deposits provide an incentive for a shopping center tenant to keep his space in good repair, a requirement which benefits the entire shopping center enterprise.

b. *Solution.*—The bill provides that an assignee pay the same security deposit as would be required by the landlord, if the landlord was leasing the space.

TECHNICAL AMENDMENTS

1. Compliance with provisions of the lease assumed

a. *Problem.*—Some trustees have interpreted the Code as providing that an assignee of a shopping center lease does not have to comply with the use and other important clauses contained in the lease being assumed, but only is bound to comply with such clauses contained in the other leases, financing agreements, and master agreements relating to the shopping center. Such an incorrect interpretation would allow an assignee to violate the use clause of the lease. This interpretation clearly is contrary to the intent of this Committee and works to the detriment of the shopping center and all of its solvent tenants.

b. *Solution.*—The bill confirms that under the Code, the new tenant must comply with all the provisions of the lease being assumed, as well as the provisions of other agreements relating to the shopping center.

2. Application of protections in all assignment situations

a. *Problem.*—Specific protections are provided for shopping centers and their tenants by the Code. However, due to a technical omission in the Code, these protections may be construed to apply only if there has been a default of the lease. This would permit a trustee to assign a lease in violation of these protections as long as he does not default on the lease.

b. *Solution.*—The bill confirms that these protections apply to any assignment of a shopping center lease, whether or not there has been a default.

3. Termination under State law

a. *Problem.*—If a lease is terminated under state law prior to the order for relief, by reason of its own terms or by judicial order, there is a potential ambiguity about its inclusion in the estate.

b. *Solution.*—The bill removes any possible ambiguity by clarifying that under existing law the lease is no 'onger property of the debtor and should not be subject to the bankruptcy proceedings.

4. Termination by its own terms

a. *Problem.*—Where a lease terminates by its own terms, i.e., where the term of the lease comes to an end at a date certain, potentially there is uncertainty as to whether any rights in the property become assets of the bankrupt's estate.

b. *Solution.*—The bill makes it clear that in such a case the lease is not the property of the estate, that the automatic stay provisions of

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the Code do not apply, and that the landlord can recover the premises as provided under state law.

Summary of Bill and Sectional Analysis

SUMMARY OF PROVISIONS OF S. 2297

1. S. 2297 amends § 365 of the Bankruptcy Code to accomplish the following:

(a) Impose a 60 day limit on a trustee's acceptance or rejection of an unexpired lease in all bankruptcy cases, which may be extended for cause.

(b) Require the trustee to perform all of the obligations of the tenant under the lease, including the payment of rent and other charges specified in the lease, until the lease is assumed or rejected, unless the court extends the time for performance, for cause, up to 60 days after the petition is filed.

(c) Delete the word "substantially" from the provisions requiring that an assignment of a shopping center lease would not breach other agreements and would not disrupt tenant mix.

(d) Require that an assignee of a shopping center lease would have an operating and financial performance similar to that of the original tenant when the lease was executed.

(e) Allow the lessor, in the event of a lease assignment, to require his customary security deposit from the new tenant.

(f) Make clear that under existing law any assignment of a lease is subject to all of the provisions of the lease being assigned as well as the provisions in any other relevant document, such as a financing agreement.

(g) provide that the special provisions for assignment of shopping center leases apply whether or not there has been a default under the lease.

(h) Clarify existing Code language to make clear that leases that have been terminated under state law will not be treated as property of the debtor and will not be subject to the administration of the bankruptcy court.

2. S. 2297 amends § 541 of the Bankruptcy Code to make clear that property subject to a lease which has expired by virtue of its own terms is not property of the estate and that a proceeding to obtain possession of such property is not automatically stayed by § 362 of the Code.

SECTIONAL ANALYSIS

Section 1

This section provides that this Act may be cited as the "Shopping Center Protections Improvements Act of 1982."

Section 2

This section amends section 365 (a), (b), (c) and (d) of Title 11, United States Code, as follows:

1. Section 365(a) is amended by adding the language:

> The trustee shall timely perform all the obligations of the tenant arising from and after the date of the order for relief, under an unexpired lease (including payment of the rent and

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other charges specified in such lease) until such lease is assumed or rejected, not withstanding the provisions of Section 503 of this title. For cause shown, the court may extend the time for performance of any obligation of rent or other charges due upon an unexpired lease pursuant to the provisions of Section 108(b) of this title. Acceptance of such performance shall not constitute a waiver or relinquishment of the lessor's rights under the lease or under this title.

The purpose of this amendment is to make clear that the trustee is responsible for paying post-petition rent and other charges and performing other obligations of the lease on a timely basis until the lease is assumed or rejected.

However, where a trustee, unfamiliar with the business of the debtor, is appointed to administer the estate, and where there is reason to question the requirement to pay rent or other charges or to perform other obligations of the estate under the lease, the trustee may petition the court, and, if cause can be shown, the court may extend the time for performance of such post-petition obligations to a date no later than 60 days after the order for relief. Under Section 108(b), the trustee has 60 days after the order for relief to cure defaults and perform other similar acts.

This amendment also makes clear that the lessor's acceptance of such performance by the trustee does not constitute a waiver of relinquishment of the lessor's rights under the lease or under the Bankruptcy Code.

2. Section 365(b)(3) has been amended to provide that adequate assurance of future performance of a shopping center lease applies not only where there has been a default, but whenever an unexpired lease is assigned. This change is necessary because, due to a technical omission in the Bankruptcy Code, the protections for shopping centers and their solvent tenants which are provided in Section 365(b)(3) could be construed as not applying in a situation where the debtor has not defaulted on his lease and seeks to assign the lease in violation of the use clause or other provisions of the lease.

3. Section 365(b)(3)(A) is amended to require an adequate assurance that any assignee of the lease will have an operating and financial performance, including guarantors, similar to that of the original tenant when the lease was executed.

This provision is intended to prevent a shopping center lease from being assigned to another business in poor financial condition. Such a business might itself soon fail, resulting in a repetition of the problems caused by the bankruptcy of the assignor.

This provision gives the lessor and the other tenants the benefit of the original bargain with the debtor. Indicia of operating and financial performance include advertising effort, marketing style, profitability, debt rating, and ability to meet debt obligations.

4. Section 365(b)(3)(C) is amended to make clear that the assumption or assignment of a shopping center lease is subject to all the provisions of that lease, as well as to any other lease, financing agreement, or master agreement relating to the shopping center. Debtors have argued incorrectly that this provision only requires adequate assurances that the provisions of such "other" leases and

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agreements would not be breached, but that it would not require such assurances regarding the provisions of the lease being assigned.

5. Sections 365(b)(3) (C) and (D) are amended to delete the word "substantially" from provisions requiring that an assignment of a shopping center lease will not breach the assigned lease or other leases or agreements and will not disrupt the tenant mix.

In practice, the presence of the qualifier "substantially" has enabled trustees to ignore the use clause of leases. This violates the assigned lease and other agreements and, thereby, disrupts the tenant mix to the detriment of the other tenants of the shopping center. In 1978, Congress recognized the importance of compliance with the use clauses, and this amendment is necessary to effect Congress' intent.

6. Section 365(c)(3) has been added to provide that the trustee may not assume or assign an executory contract or unexpired lease if "such contract or lease has been terminated under state law prior to the order for relief."

The purpose of this amendment is to provide that an executory contract or unexpired lease may not be assumed or assigned by a trustee, if such contract or lease has been terminated by a state court judgment or otherwise under state law prior to the order for relief.

7. Section 365(d)(1) has been amended to provide that in all cases under the Bankruptcy Code, an executory contract or unexpired lease of the debtor is deemed rejected, if the trustee does not assume or reject such a contract or lease within 60 days, or within such additional time as the court, for cause, orders. Under current law, this 60 day time period only applies to cases under Chapter 7. This amendment extends the 60 day limit to all cases.

In addition, this amendment provides that if a lease is deemed rejected, "the court shall order the premises to be vacated immediately."

The existing language of Section 365(d)(2), which deals with cases under Chapters 9, 11, or 13, is deleted.

8. Section 365(d)(2) is replaced with language providing that if an unexpired lease is assigned, the lessor may require from the new tenant a security deposit for the performance of the obligations of the lease which is substantially the same as that required by the landlord upon the initial leasing and a similar tenant.

This amendment is intended to give the landlord the benefit of his original agreement with the debtor, and provide protection to the shopping center and its other tenants equivalent to that of the original bargain.

Section 3

This section amends Section 541 of Title 11, United States Code, to make clear that property subject to a lease which has expired by virtue of its own terms is not property of the estate and that a proceeding to obtain possession of such property is not automatically stayed by Section 362 of the Code.

This amendment is intended to permit landlords to proceed promptly in state court to reclaim possession of leased premises where such lease has expired by its own terms, i.e., because a specified termination date of the lease has been reached. This change is intended to facilitate the ability of the landlord to re-lease the space to another tenant as soon as possible.

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BUDGET AND REGULATORY IMPACT; CORDON RULE

A. BUDGET IMPACT

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., August 9, 1982.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2297, the Shopping Center Protections Improvements Act of 1982, as ordered reported by the Senate Committee on the Judiciary, August 4, 1982.

The bill would clarify the responsibilities of the trustee, pursuant to the Bankruptcy Reform Act of 1978, concerning shopping center leases. The bill shortens the period within which the trustee must assume or reject any executory contract or unexpired lease of a tenant who has obtained an order for relief. The trustee would be responsible for all of the tenant's obligations arising from and after the date of the order for relief under the unexpired lease, until the lease is assumed or rejected. CBO estimates that enactment of this legislation would result in no additional cost to the government.

Should the Committee so desire, we would be pleased to provide further information.

Sincerely,

ALICE M. RIVLIN, *Director.*

B. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact as defined by that subsection will result from the enactment of S. 2297.

C. CHANGES IN EXISTING LAW

In compliance with Rule XXVI(12) of the Standing Rules of the Senate, changes in existing law made by the statutory provisions transmitted herein, are shown as follows (existing law proposed to be amended is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

BANKRUPTCY CODE

* * * * * * *

SECTION 365. Executory contracts and unexpired leases.

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor. *The trustee shall timely perform all the obligations of the tenant arising from and after the date of the order for relief, under an unexpired lease* (*including payment of the*

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rent and other charges specified in such lease) until such lease is assumed or rejected, notwithstanding the provisions of § 503 of this title. For cause shown, the court may extend the time for performance of any obligation of rent or other charges due upon an unexpired lease pursuant to the provisions of section 108(b) of this title. Acceptance of such performance shall not constitute a waiver or relinquishment of the lessor's rights under the lease or under this title.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this section *and paragraph (2)(B) of section (f)*, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease **[**:**]**, *and in the case of an assignment, with an operating and financial performance, including guarantors, similar to that of the original tenant when the lease was executed;*

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease *is subject to all the provisions thereof, including provisions such as a radius, location, use, or exclusivity provision, and* will not breach **[***substantially***]** *any* such provision **[**such as a radius, locations, use, or exclusivity provision,**]** *contained* in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt **[**substantially**]** any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

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(c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of right or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of right or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(3) such contract or lease has been terminated under state law prior to the order for relief.

(d)(1) [In a case under chapter 7 of this title,] *In all cases under this title*, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected, *and in the case of a lease, the court shall order the premises to be vacated immediately.*

[(2) In a case under chapter 9, 11, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of the debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.]

(2) If an unexpired lease is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

* * * * * * *

SECTION 541. Property of the Estate.

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(b) Property of the estate does not include*: (1)* any power that the debtor may only exercise solely for the benefit of an entity other than the debtor [.]*; and (2) any property subject to a lease which has expired by virtue of its own terms without regard to the bankruptcy proceedings. In the case of property subject to a lease which has expired by virtue of its own terms, the lessor shall be entitled to enforce its rights to possession of the property subject to such lease without further order of the court and notwithstanding the provisions of Section 362(a) of this title.*

O